BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JACQUELINE KOCH-JOHN	)	
Claimant	)	
	)	
VS.	)	
	)	
NATIONS LENDING SERVICE	)	
Respondent	)	Docket No. 1,021,226
	)	
AND	)	
	)	
TRANSCONTINENTAL INS. CO.	)	
Insurance Carrier	)	

ORDER

Claimant requests review of the March 8, 2005 preliminary hearing Order entered by Administrative Law Judge Kenneth J. Hursh.

ISSUES

This is a claim for a January 11, 2005 accident. Claimant slipped and fell after she left work for the day and was walking to her vehicle in a parking lot adjacent to the building where respondent maintains an office. The issue before the Administrative Law Judge (ALJ) was whether claimant's accident arose out of and in the course of her employment with respondent.

The ALJ determined the area where claimant fell was neither the premises of her employer nor an area controlled and maintained by her employer. Moreover, the ALJ determined claimant had left her workplace and the "special risk exception" to the going and coming rule did not apply. Accordingly, the ALJ ruled that claimant's injury did not arise out of and in the course of employment and denied the claimant's request for medical treatment and temporary total disability benefits.

The claimant requests review and argues the accident is compensable under both the "premises" and "special hazard" exceptions to the going and coming rule in K.S.A. 44-508(f). Claimant argues because the respondent's landlord owned and maintained the parking lot it is considered part of respondent's premises. In addition, claimant further contends the special hazard exception is applicable because she was required to park farther away from the door so that customers could use the parking spaces closer to the

building. As a consequence she had to walk a greater distance on the icy sidewalk to the parking lot and was exposed to a greater risk than the general public. Accordingly, the claimant requests the Board to find the claim compensable.

Conversely, the respondent argues claimant had left work for the day and the slip and fall occurred in an area neither leased, controlled nor maintained by respondent. Accordingly, respondent argues the fall did not occur on its premises. Respondent further argues that the risk of slipping on the icy surface was the same for claimant as it was for the general public since the fall occurred on a common area used by the public and therefore there was no special hazard. Respondent requests the Board to affirm the ALJ's Order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

The ALJ's Order set forth in detail the pertinent facts in this claim and the Board adopts the Judge's findings and analysis. It is undisputed that claimant had left work for the day and exited the building where respondent leased office space. As she walked toward her parked car she slipped and fell. She described the incident as occurring after she stepped down off the curb into the parking lot.

The respondent did not control or maintain the parking lot which the public accessed to conduct business with any of the businesses located in the building where respondent leased office space as well as other businesses located in the office building strip mall complex. Although claimant was restricted from parking in the spaces next to the buildings in order to leave those spaces for customers, she was allowed to park in any other available parking space. Those parking spaces could also be used by employees of the other businesses in the complex as well as customers and the general public. The respondent's lease provided the right of nonexclusive use, in common with others, of the parking areas.[1]

The "going and coming" rule contained in K.S.A. 2004 Supp. 44-508(f) provides in pertinent part:

> The words 'arising out of and in the course of employment' as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume

[1] P.H. Trans., Resp. Ex. A. at 4.

> the duties of employment or having left such duties at a time when the worker is on the premises of the employer or on the only available route to or from work which is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer. An employee shall not be construed as being on the way to assume the duties of employment, if the employee is a provider of emergency services responding to an emergency.

K.S.A. 2004 Supp. 44-508(f) is a codification of the "going and coming" rule developed by courts in construing workers compensation acts. This is a legislative declaration that there is no causal relationship between an accidental injury and a worker's employment while the worker is on the way to assume the worker's duties or after leaving those duties, which are not proximately caused by the employer's negligence.[2] In *Thompson*, the Court, while analyzing what risks were causally related to a worker's employment, wrote:

> The rationale for the 'going and coming' rule is that while on the way to or from work the employee is subjected only to the same risks or hazards as those to which the general public is subjected. Thus, those risks are not causally related to the employment.[3]

But K.S.A. 2004 Supp. 44-508(f) contains exceptions to the "going and coming" rule. First, the "going and coming" rule does not apply if the worker is injured on the employer's premises.[4] Another exception is when the worker is injured while using the only route available to or from work involving a special risk or hazard and the route is not used by the public, except dealing with the employer.[5]

Before the "special hazard" exception will apply, the accident (1) must occur on the only route available to or from work, (2) the route must possess a special risk or hazard, and (3) the route must be used by the public, if at all, only to deal with the employer. The claimant must prove all three elements.[6]

As previously noted, the claimant slipped and fell walking through a parking lot that was used not only by respondent's employees but also by the general public and the employees of the other businesses located in the building as well as the businesses in the

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[2] *Chapman v. Victory Sand & Stone Co.*, 197 Kan. 377, 416 P.2d 754 (1966).

[3] *Thompson* v. *Law Offices of Alan Joseph*, 256 Kan. 36, 46, 883 P.2d 768 (1994).

[4] Id. at Syl. ¶ 1. Where the court held that the term "premises" is narrowly construed to be an area, controlled by the employer.

[5] *Chapman v. Beech Aircraft Corp.*, 258 Kan. 653, 907 P.2d 828 (1995).

[6] *Id*. at 653.

adjacent strip mall complex. And the route from the parking lot to respondent's office did not involve a special risk or hazard nor was it a route only utilized by the public to deal with respondent. The public used the parking lot and adjacent sidewalks in dealings with all the businesses located in the building where respondent leased office space. Anyone walking in the parking lot would have been subjected to the same risk of slipping and falling. The Board concludes that claimant has failed to prove the three requirements of the "special hazard" exception.

The parking lot and sidewalk were not under the exclusive control of the respondent. While the parking lot was utilized by respondent's employees and customers, there is no evidence to show that it was exclusively used and/or controlled by only respondent's employees and customers. The parking lot and sidewalk were regularly utilized by members of the general public in dealing with all the businesses located in the building which contained respondent's office as well as the other businesses in the strip mall complex.

By designating where its employees should not park, respondent did not exercise such control over the parking lot so as to render it part of its premises. In fact, the respondent's lease specifically noted respondent and its employees were only provided nonexclusive use of the parking areas in common with the other tenants and customers. The lot was neither owned, controlled, nor maintained by respondent. Accordingly, claimant was not on her employer's premises at the time of her fall.

WHEREFORE, it is the finding of the Board that the Order of Administrative Law Judge Kenneth J. Hursh dated March 8, 2005, is affirmed.

IT IS SO ORDERED.

Dated this 31st day of May 2005.

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BOARD MEMBER

c: Gary D. Rappard, Attorney for Claimant
James R. Hess, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director